



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: ZOE Construction Company, Inc.

File: B-244877

Date: November 26, 1991

Bill C. Giallourakis, Esq., for the protester,
Herbert F. Kelley, Jr., Esq., and Gerald P. Kohns, Esq.,
Department of the Army, for the agency.
Christina Sklarew, Esq., Office of the General Counsel, GAO,
participated in the preparation of the decision.

DIGEST

Bid for roof repairs contract must be rejected as nonresponsive where bidder fails to provide a certification by the roofing manufacturer that it agrees to a 20-year warranty required by the invitation for bids.

DECISION

ZOE Construction Company, Inc. protests the proposed award to Moniaros Contracting Corporation for the repair and replacement of various roofs at the New Jersey Air National Guard Base in Pleasantville, New Jersey, under invitation for bids (IFB) No. DAHA28-91-B-0003, issued by the National Guard Bureau. ZOE contends that Moniaros' bid was non-responsive and should have been rejected. We sustain the protest.

The IFB was issued on June 4, 1991. The IFB's "Description of Work" provided details of the flexible sheet roof system (FSR) that was required and advised bidders that the "FSR Manufacturer's Certification" (Roofing Certification 1) that was included in the IFB was a "qualification" for award. The IFB instructed bidders to have the manufacturer of the proposed FSR system execute Roofing Certification 1 prior to bid submission, and to include the completed certification in the bid.

The first portion of the four-page Roofing Certification form called for the manufacturer to certify that the bidder is a licensed applicator of the manufacturer's roofing system capable of obtaining the manufacturer's 20-year labor and materials warranty. The second part required the manufacturer to specify which of its roofing systems were suitable for each of the six buildings covered by the IFB

and to attach the appropriate product literature. The third part was a pre-printed 20-year warranty provision by which the manufacturer certified that the system "is delivered subject to a full material and workmanship warranty for 20 years that guarantees that manufacturer will pay all costs necessary to maintain the . . . system in a watertight condition. . . ." It also described other terms, conditions and limitations of the parties under that warranty. It also included the following provisions: "It is understood by the manufacturer/contractor that the warranty provided herein shall be for the benefit of the Air National Guard," and "[t]he warranty contemplated herein shall be in addition to" other warranties. Space was provided for signatures of the manufacturer or manufacturer's representative.

When bids were opened as scheduled on July 3, the agency found that Moniaros had submitted the apparent low bid, and ZOE the second low bid. Moniaros' bid did not include the required Roofing Certification 1. ZOE protested to the agency, alleging that Moniaros' failure to provide the certification rendered its bid nonresponsive, making Moniaros ineligible to receive the award. The contracting officer denied the protest based on his determination that the certification involved a matter of the bidder's responsibility which could be determined any time prior to award. ZOE then filed its protest with our Office, contending that it had submitted the lowest-priced responsive bid and was therefore entitled to the award. The agency has stayed any award of the contract pending the resolution of this protest.

ZOE asserts that while the first portion of the certification, concerning the bidder's qualifications as a licensed applicator of the system and its ability to obtain the required warranty, does relate to the bidder's responsibility, the remainder of the certification relates to the responsiveness of the bid. We agree.

To be responsive, a bid must represent an unequivocal offer to provide the exact thing called for in the IFB, such that acceptance of the bid will bind the contractor in accordance with the solicitation's material terms and conditions.

Westec Air, Inc., B-230724, July 18, 1988, 88-2 CPD ¶ 59. Warranty requirements are considered material, and therefore a bidder's exception to, or qualification of, an IFB's warranty provisions renders its bid nonresponsive. See Genesis General Contracting, Inc., B-225794, June 1, 1987, 87-1 CPD ¶ 550.

Here, it is clear that the IFB required manufacturers to commit to a 20-year warranty. As quoted above, the IFB specifically required the manufacturer to certify that the roofing system to be delivered was subject to a full

material and workmanship warranty for 20 years that guaranteed that the manufacturer would pay all costs to maintain the roofing system in a watertight condition despite such things as deterioration from ordinary wear and tear, and movement of the underlying surface or material used as a base for the roof system. This warranty, which contained explicit terms and conditions, was included in the IFB as part of the certification required to be completed. The warranty terms provided that the government could initiate repairs at the manufacturer's expense if the manufacturer failed to do so and that this right existed notwithstanding government inspection and acceptance. The warranty also required that emergency repairs be performed within 24 hours of notice and that permanent repair be performed within 30 days without cost to the government. The warranty contained exclusions for leaks caused by natural disasters, fire and other enumerated reasons. Other warranty terms provided that the warranty was for the National Guard's benefit and placed the burden of proof on the manufacturer to establish by a preponderance of the evidence the existence of a condition which established an exclusion from coverage.

In our view, the contracting officer's determination that Moniaros' bid was responsive was in error since the bid did not contain the manufacturer's acceptance of the specific terms and conditions of the 20-year warranty that was required by the IFB and therefore in effect took exception to the IFB warranty requirement.

The agency argues that the IFB did not require the manufacturer to certify its acceptance of the 20-year warranty, and points to certain certification language--this system is delivered "subject" to a 20-year warranty and "the warranty contemplated herein" (emphasis added)--which it believes shows that the warranty was not required with the bid but could be provided later. We think it is clear, however, the IFB required the bid to include a manufacturer's commitment that the roofing work would be backed by a 20-year warranty conforming to IFB requirements. The completed, signed certification was to constitute that commitment. Indeed, the very language relied on by the agency--"this system is delivered subject to a full . . . warranty for 20 years" and the reference to "warranty contemplated herein"--strongly supports the view that the signed certification in the bid was intended to serve as the commitment to the warranty terms and conditions. Accordingly, because the bid did not include the signed warranty certification or any other statement that evidenced a commitment to the warranty requirements, doubt was created as to whether the Moniaros bid obligated the firm to provide a suitable FSR system that included the requisite 20-year warranty. The existence of this doubt requires rejection of the bid, since a failure to

offer unequivocally to comply with all of the IFB's material terms at the offered price renders the bid nonresponsive. See Penn Perry, Inc., B-241777, Mar. 1, 1991, 91-1 CPD ¶ 235.

The agency mistakenly relies on our decisions in Western Roofing Serv., B-234314.2, May 22, 1989, 89-1 CPD ¶ 486 and AMKO Constr. Co., Inc., B-234309.2, July 12, 1989, 89-2 CPD ¶ 35, to support its determination that the certification at issue here involved only a matter of responsibility. In those cases, the certification that was required was identical to the first portion of the certification at issue here, which requires the manufacturer only to provide information about the bidder/contractor's capabilities: specifically, the bidder/contractor's capability to perform the work and capability to obtain the manufacturer's warranty. It did not involve the requirement for information about the roofing system being proposed, its suitability to the particular buildings where it would be installed, or the manufacturer's intention to be bound to a specific warranty requirement under the contract based on the roofing system proposed, as is the case here. Where this type of warranty information is at issue, we have found the certification to involve the bid's responsiveness. See Genesis General Contracting, Inc., B-225794, supra.

We sustain the protest, and by letter of today, we are recommending to the Secretary of the Army that the contract be awarded to ZOE. In addition, ZOE is entitled to recover its costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d) (1991). The protester should submit its claim for its costs directly to the agency.

Milton J. Auster
for Comptroller General
of the United States